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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 158.

ISABEL KAY, BERTHA BUTMAN and BERTHA
BUTMAN, as Executrix under the Will of Julia Kay,
Petitioners,

v.

EMILY W. MacCORMACK, EDITH M. MacCORMACK,
and ROBERT S. MacCORMACK, Jr., as Executors and
Trustees under the Will of Robert S. MacCormack, de-
ceased, and MARIE HEGEMAN WARNOCK, individ-
ually and as surviving executrix of the Estate of Henry B.
Hegeman, deceased, and MAX R. HOENER, substitue-
successor executor under the Will of George L. Buckman,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.**

ROBERT S. MACCORMACK, JR., *pro se*,
273 New Jersey Avenue,

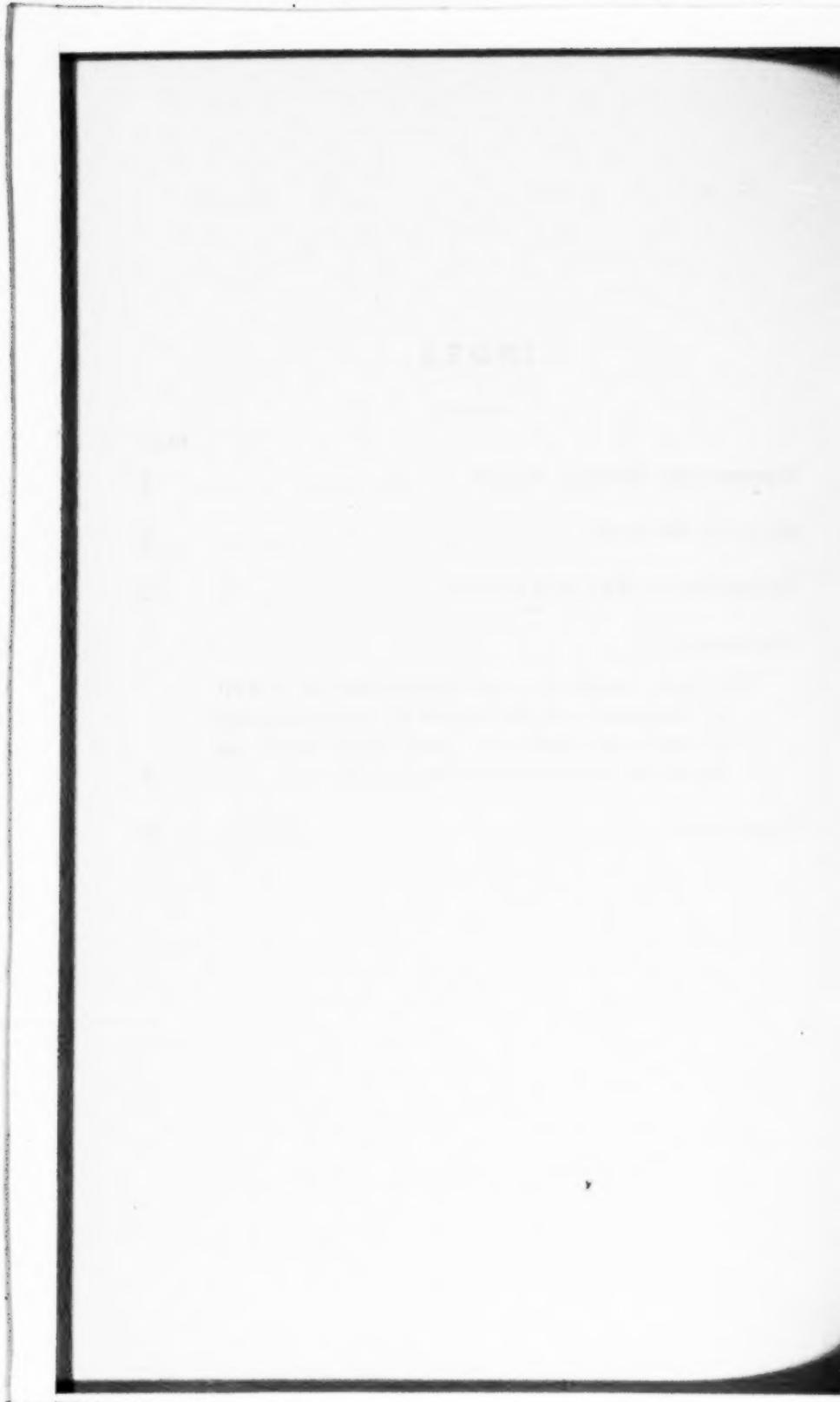
Union, N. J.,

*As Executor and Trustee under the Will
of Robert S. MacCormack, Deceased.*



INDEX.

	PAGE
REPORTS AND OPINIONS BELOW.....	1
STATUTES INVOLVED	2
STATEMENT OF MATTER INVOLVED.....	2
 ARGUMENT:	
The issue involved in this application for a Writ of Certiorari was not raised by petitioners and is academic since the petitioners were not agreed by the determination below.....	3
CONCLUSION	5



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EMILY W. MACCORMACK, EDITH M. MACCORMACK, and
ROBERT S. MACCORMACK, JR., as Executors and Trustees
under the Will of Robert S. MacCormack, deceased, and
MARIE HEGEMAN WARNOCK, individually and as surviving
executrix of the Estate of Henry B. Hegeman, deceased,
and MAX R. HOENER, substitute-successor executor under
the Will of George L. Buckman,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK.

The respondent, Robert S. MacCormack, Jr., as an executor and trustee under the will of Robert S. MacCormack, deceased, files this brief in opposition to the petition of the petitioners.

Reports and Opinions Below.

The Court of Appeals wrote no opinion, but its order is at R. 37, and is reported at 296 N. Y. 915, 73 N. E. (2d) 37.

The opinion of the Supreme Court, Appellate Division, appears at R. 30, 34, and is reported at 270 App. Div. 707, 62 N. Y. S. (2d) 337. The opinion of the Surrogate's Court appears at R. 25, and is reported at 183 Misc. 1, 50 N. Y. S. (2d) 201.

Statutes Involved.

The following statutes of New York are involved: Section 124 of the Decedent Estate Law, Section 249-m and 249-r of the Tax Law, and Section 56 of the Surrogate's Court Act.

Statement of Matter Involved.

The executor of the Estate of George L. Buckman instituted a proceeding in the Surrogate's Court of New York County for the judicial settlement of his account as executor.

Respondent is an executor and trustee of the Estate of Robert S. MacCormack, duly appointed by the Surrogate of Union County, and the estate he represents is not a beneficiary of and has no claim against the Estate of George L. Buckman.

Respondent believes that the Surrogate's Court of New York County cannot compel respondent, a New Jersey Fiduciary, to submit to the jurisdiction of the Surrogate's Court of New York County in an action to settle the accounts of the executor of an Estate in which the estate respondent represents is not interested either as a beneficiary or claimant.

ARGUMENT.

The issue involved in this application for a writ of certiorari was not raised by petitioners and is academic since petitioners were not aggrieved by the determination below.

This proceeding originated in the Surrogate's Court of New York County, New York. The purpose of the proceeding was to settle the account of an executor.

Petitioners filed objections to that account in which they demanded that the executor collect from the donees of certain *inter vivos* gifts (admittedly made in contemplation of death) such portion of the estate tax as was predicated on those gifts or pay it himself (Record, p. 12, fol. 19).

Thus, the issue raised by petitioners' objections was an issue between them and the executor and was not an issue between these petitioners and these respondents, and that issue was clearly within the jurisdiction of a New York State Surrogate.

At that point, however, the Surrogate, to whom that issue was presented, of his own volition, intervened and directed the executor to file a supplemental petition and to secure and serve a supplemental citation requiring all living recipients of those *inter vivos* gifts and the personal representatives of all deceased recipients of such gifts, regardless of their domiciles, to appear in the Surrogate's Court in New York for a "final determination" of the rights of the parties with respect to the allocation of the estate tax (Record, pp. 13 and 14, fol. 20).

The executor followed the directions of the Surrogate but under protest. He protested that non-resident recipients of gifts who were not beneficiaries under the will or claim-

ants to a part of the estate could not be brought into a Surrogate's Court of New York by a citation served outside the State of New York (Record, p. 14, fol. 21).

These respondents and their testators are non-residents, being domiciled in New Jersey; they are not beneficiaries under the will and they do not claim any part of the estate (Record, pp. 14 and 15, fol. 22). Nevertheless, such supplemental citation was served on them outside the State of New York (Record, p. 3, fol. 5).

These respondents appeared specially and moved to set such service aside (Record, p. 3, fol. 5). The Surrogate denied the motion; the Appellate Division of the First Department reversed and set the service aside and the Court of Appeals affirmed the Appellate Division (Record, p. 37, fols. 60 and 61).

Thus, these petitioners, the executor and the donees of the *inter vivos* gifts, including these respondents, are just where they were before the Surrogate intervened and directed the issuance and service of the supplemental citation. No one of them is the loser or is in any way aggrieved. The issue raised by the objections of these petitioners may still be tried in the Surrogate's Court in New York.

The basic issue before the Surrogate was the procedure to be followed by the executor in order to collect from non-resident donees of *inter vivos* gifts who had no interest in the estate as beneficiaries or claimants that portion of the Federal and State Estate Tax which the Surrogate might find should be apportioned against their *inter vivos* gift. The Court of Appeals merely held the Surrogate could not obtain jurisdiction over these respondents by service of citation by publication in an accounting proceeding. There was no final determination of the rights of the parties.

If the Surrogate so directs, the executor can pursue the gift beneficiaries by the use of due legal process and may endeavor to collect their respective shares of the estate tax. If the executor fails, through negligence or connivance, to make such collection, the Surrogate can surcharge him.

Therefore, the issue which this Court is being asked to take under consideration is extraneous and academic.

Conclusion.

For the foregoing reasons respondent believes that the Petition for Writ of Certiorari should be denied.

Dated: July 29, 1947.

Respectfully submitted,

ROBERT S. MACCORMACK, JR., *pro se*,
As executor and trustee under the Will
of Robert S. MacCormack, deceased.